that this complementary act of the California Commission did not conflict with federal law:

> ". . . [T]he intention to supersede the exercise by the state of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the state [citations]. We find no such conflict in this case, as the approval of the Interstate Commerce Commission has been obtained, and its certificate of public convenience and necessity has been issued, in relation to the rearrangement, extensions and abandonment of tracks, and the use of the terminal facilities, involved in the proposed plan, and nothing further was required by the Interstate Commerce Act." *Atchison, T. & S.F.R.Co. v. Railroad Commission,* 283 U.S. 380, 392-393 (1931).

In this case, as in the *Union Terminal* cases, all the issues of federal law have been fully heard. The PUC acted within its sphere of authority simply to bring about the situation which the Interstate Commerce Commission had found to be required by public convenience and necessity.

It is true that in the instant case, unlike the *Union Terminal* cases, a federal remedy exists in the form of a suit for injunction under Section 1(20) of the Interstate Commerce Act. However, no reason can be put forward for reading that section as preempting the power of state commissions to act in concert with the Interstate Commerce Commission.

In a proceeding for an injunction,

> "[t]he function of the court . . . is to construe a statutory provision and apply the provision as con-

> strued to the facts. The prohibition of ¶ 18 is absolute. If the proposed track is an extension and no certificate has been obtained, the party in interest opposing construction is entitled as of right to an injunction." *Texas & P.R. Co. v. Gulf, C. & S.F.R.Co.*, 270 U.S. 266, 273 (1926).

In such a proceeding, the court should not and will not hear evidence of public convenience and necessity. *Gilmore v. Sandersville R.Co.*, 149 F.Supp. 725 (M.D. Ga. 1955); *Chicago, M., St. P. & P.R.Co. v. Northern Pacific R. Co.*, 120 F.Supp. 710 (W.D. Wash. 1954), *affirmed* 225 F.2d 840 (CA9 1955). The principal issue in such litigation is whether a certificate is necessary or not, since if one is not necessary, there is no jurisdiction. If an Interstate Commerce Commission certificate is necessary for the abandonment or construction, and if it has not been issued, the court must enjoin the act complained of.

In the instant case, a certificate was necessary to permit abandonment. The Interstate Commerce Commission held that it would not issue such a certificate because there was a need for restoration of former rail service and the cost of reconstruction would not unduly burden interstate commerce. Following that decision, as affirmed by this Court, a suit for injunction could have been brought in a federal district court under Section 1(20) and such court would have had to issue such injunction. But this fact did not preclude the California Public Utilities Commission from taking action in aid of the jurisdiction of the Interstate Commerce Commission.

In the leading case of *Colorado v. United States*, 271 U.S. 153 (1926), Justice Brandeis set forth the rationale

of federal regulation of physically-intrastate railroads: "The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in the Shreveport Case [citation], a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce." 271 U.S. at 164. Under the *Colorado* rationale, an intrastate railroad line may be abandoned if its continued operation would unduly burden interstate commerce. Conversely, as in the instant case, such abandonment will not be authorized by the Interstate Commerce Commission if continued operation would not constitute an undue burden on interstate commerce. The Interstate Commerce Commission is to decide abandonment cases according to a balancing test. "The sole test prescribed is that abandonment be consistent with public convenience and necessity. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. * * * The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce." 271 U.S. at 168.

The federal scheme of regulation thus contemplates that before a line of railroad, interstate or intrastate, may be abandoned, the Interstate Commerce Commission must determine that the loss of service to local shippers is overbalanced by the burden which would be placed on interstate commerce by continued operation. When a certificate is denied by the Interstate Commerce Commission,

the federal interest has been protected. The requisite determination—that interstate commerce will not be unduly burdened by continued operation—has been made. Once that determination has been made, there is no federal interest to be served by construing Section 1(20) of the Interstate Commerce Act as preventing regulation of service by a state commission.

It cannot be said that any federal interest would be promoted by construing Section 1(20) as preventing the type of state regulation here under consideration. Indeed, such construction would tend to involve the federal district courts in the direct regulation of railroad practices, facilities, and service, a function which those courts, even in the exercise of their equity jurisdiction, are ill-equipped to undertake. Traditionally, a court of equity will not specifically enforce a contract requiring supervision over a series of continuing acts. While equity courts have in some cases enforced railway operating contracts, involvement of the federal district courts in the kind of day-to-day regulatory supervision which administrative agencies have been designed to undertake would serve no federal interest.

The decisions cited by appellant in support of its view that the PUC order encroaches upon exclusive federal jurisdiction do not in fact support that position. In general, these decisions involve the adjustment of jurisdiction as between the Interstate Commerce Commission and the federal courts, or the prevention of state action which interferes with the exclusive jurisdiction of the Interstate Commerce Commission to determine whether an abandonment will be authorized. We will discuss them only briefly.

Village of Mantorville v. Chicago Great Western R. Co., 8 F.Supp. 791 (D.Minn. 1934) held that once the Interstate Commerce Commission had granted a certificate permitting abandonment, a federal district court could not issue an injunction ordering the railroad to keep the line in service. The court pointed out that "the defendant company is asked to do that which is directly contrary to the order of the Commission." 8 F.Supp. at 794.

The dictum in *Myers v. Famous Realty, Inc.*, 271 F.2d 811, 816, n. 6 (CA2 1959), cited by appellant refers only to the situation obtaining before the railroad has applied to the Interstate Commerce Commission for a certificate of abandonment. The court said ". . . it is clear that the United States district court is the only forum having jurisdiction to prevent an illegal abandonment *begun without the institution by the carrier of a § 1(20) proceeding before the Commission.*" (Emphasis supplied.)

Texas & P.R. Co. v. Gulf, C. & S.F.R.Co., 270 U.S. 266 (1926) is also concerned with the situation before the Interstate Commerce Commission has acted. The case involved construction of an extension. The Court held that a railroad could enjoin a competitor from constructing an extension without an Interstate Commerce Commission certificate, in a federal court suit under § 1(20). In stating that the proper remedy was under § 1(20), the Court was simply pointing out that adverse parties (parties who would be protestants before the Interstate Commerce Commission if the railroad had applied for a certificate) could not themselves initiate proceedings before that Commission. The Court said, 271 U.S. at 273:

> "But a party in interest who is opposed to the construction is not authorized by the act to initiate before the Commission any proceeding concerning the project."

St. Louis S.W.R.Co. v. Mo.Pac.R.Co., 289 U.S. 76 (1933) also involved a construction situation prior to any Interstate Commerce Commission application for a certificate. The *St. Louis* decision specifically upheld the propriety of a decision by the Arkansas Commission which determined the appropriate place, manner and terms of constructing a crossing between two railroads. The Court held that the Arkansas order would not be set aside, because it did not and could not conflict with the future determination to be made by the Interstate Commerce Commission as to whether the extension which would require the crossing should be certificated. Citing the Los Angeles *Union Terminal* cases, the Court said, at 289 U.S. 84,

> "If the track is held to be an extension, that [state commission] order will not become effective unless the Missouri Pacific should secure a certificate from the Interstate Commerce Commission. Indeed, the prior determination by the state commission of the place, manner, and terms of the crossing may, by making the plan more concrete and definitive, aid the federal commission in reaching an informed judgment on the application. Compare Los Angeles Passenger Terminal Cases, 100 Inters. Com. Rep. 421, 459."

Finally, *Powell v. United States*, 300 U.S. 276 (1937) was concerned with the proper distribution of federal

jurisdiction. The Court held that the legal question of whether an extension was merely a spur track (which would eliminate all federal jurisdiction) should be determined by a conventional federal district court in a §1(20) proceeding, and could not be determined either by the Interstate Commerce Commission or by a three-judge district court reviewing an order of the Interstate Commerce Commission.

To summarize, §1(20) does not explicitly or implicitly state that it provides the exclusive remedy for illegal abandonment. In the absence of such a statement, and in the absence of any statement to that effect in any related statute, and in the absence of any decision holding that §1(20) is an exclusive remedy to terminate an illegal abandonment after the Interstate Commerce Commission has acted, the question presented is whether exclusivity is required by any federal interest. The answer is just to the contrary. The Interstate Commerce Commission has acted, thus protecting the federal interest. Since federal district court supervision of the repair work and of the nature of service to be rendered through the tunnel would involve the court in supervisory regulation of a kind far more appropriately handled by an administrative agency, the action which the PUC took should be sustained. Such action clearly fell within its regulatory jurisdiction, was in aid of the ICC's decision, and was not in contravention of any Congressional intent to limit jurisdiction to a federal court. The rationale of the *Union Terminal* cases should be controlling.

2. ALLEGED STORM DAMAGE IS NOT A PROPER ISSUE

As noted in the Statement, *supra,* the question of storm damage is not properly before the Court, since the question was not raised before the California Commission, nor before the California Supreme Court until after that Court's decision.

Moreover, the alleged storm damage does not present a federal question. Appellant correctly states that the question could not be presented to the California Supreme Court because of Section 1757 of the California Public Utilities Code providing that the State Supreme Court must hear the case on the record as certified by the PUC (Jurisdictional Statement, page 13). Appellant does not challenge the validity of that statute; therefore, no federal question is presented.

However, appellant contends that this Court should remand the matter to the California Public Utilities Commission with instructions to consider the question of storm damage, on the ground that the repair costs have so affected the financial position of appellant (a wholly owned subsidiary of the Southern Pacific Company) that the confiscation issue, determined against appellant in the earlier litigation, *Northwestern Pacific Railroad Company v. United States,* 228 F.Supp. 690 (1964), *affirmed* 379 U.S. 132 (1964), may now be reexamined.

No federal question is raised by this line of argument, despite appellant's use of the talismanic phrases "undue burden" and "confiscation". PUC's failure to consider the storm damage cannot raise a federal question, where appellant has not requested the PUC to do so. The opportunity to make such request has been open ever since

the storm damage occurred, and is still open today. Section 1708 of the California Public Utilities Code provides:

> "The Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. • • • "

Under this section, the PUC may reopen proceedings at the request of a utility long after final decision. *Edward T. Molitor,* 64 Cal. PUC 109, 110 (1965).

Therefore, appellant has failed to exhaust its administrative remedies.

Finally, the Interstate Commerce Commission, not the California Public Utilities Commission, is the proper forum in which to determine whether, because of alleged storm damage, there is now "confiscation" or a burden on interstate commerce unless the railroad line is abandoned. If the PUC were to engage in balancing appellant's ability to pay against the public's need for service over the railroad line, it would be making a determination of public convenience and necessity, thus invading the area of federal jurisdiction which appellant so zealously seeks to protect.

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3. THE ORDER OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION REQUIRING RESTORATION OF FORMER RAIL SERVICE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

Appellant objects to that part of the PUC's order requiring that appellant restore the same quantity and quality of service as existed prior to the tunnel fire. Ap-

pellant contends that the PUC violated Section 761 of the California Public Utilities Code, in that it ordered appellant to perform a particular service without taking evidence at the hearing as to the need for such service.

There is no contention that the PUC is foreclosed by any federal statute or constitutional provision from ordering that particular intrastate services be rendered by a railroad. The constitutionality of Section 761 of the Public Utilities Code has not been drawn in question. In denying appellant's petition for writ of review, the California Supreme Court has necessarily ruled that all provisions of state law were complied with. A denial of petition for writ of review of an order of the PUC is a decision on the merits. *People v. Western Airlines, Inc.*, 42 Cal.2d 621, 630-31, 268 P.2d 723, 728 (1954), *appeal dismissed,* 348 U.S. 859. It is a basic constitutional principle that the construction of state law is the exclusive responsibility of the state courts. *Speiser v. Randall,* 357 U.S. 513, 523 (1958); *Scripto v. Carson,* 362 U.S. 207, 210 (1960). Thus appellant cannot here complain that Section 761 was not complied with.

It is contended that the PUC should not have relied upon the findings of the Interstate Commerce Commission. Reliance by an administrative agency upon the facts found in another proceeding raises no substantial federal question. In *Republic Aviation Corp. v. National Labor Relations Board,* 324 U.S. 793 (1945), the Court approved a decision of the National Labor Relations Board in which the Board's finding of unfair labor practice was predicated entirely upon facts found in a previous Board decision. The Court has approved the taking of judicial

notice by courts not only of the decision of other courts, but even of the records of cases in other courts. See *National Fire Insurance Co. v. Thompson,* 281 U.S. 331, 336 (1930). In the instant case the presiding PUC commissioner properly ruled (Tr. 5) that the PUC would take official notice of the decisions of the Interstate Commerce Commission and Federal District Court. This was particularly appropriate since the PUC was acting to implement the order of the Interstate Commerce Commission, as sustained by the Federal District Court.

Appellant, however, contends that the Interstate Commerce Commission could not validly make any findings as to the need for a particular frequency of rail service. Again, this contention raises no federal question. Assuming, for purposes of argument, that the ICC's findings on the need for a specific quantity of rail service were invalid, because outside the scope of an abandonment proceeding, such does not affect the PUC's power to rely upon and adopt such findings. Reliance by an administrative agency on extra-record information does not *per se* raise any constitutional questions. In this case, it was proper for the PUC to take official notice of the ICC's findings because all of the parties before the PUC had been parties before the Interstate Commerce Commission, where the issue of need for service had been fully tried. Unquestionably, therefore, the information relied upon was reliable and appellant had had every opportunity to rebut the facts upon which the Interstate Commerce Commission had relied.

In any event, we do not concede that the Interstate Commerce Commission could not make a valid finding

as to the quantity and quality of service required. That finding was an essential basic finding to support the ultimate finding by the Interstate Commerce Commission that the public convenience and necessity required that the line not be abandoned. Since the tunnel fire, the communities and shippers in southern Marin County have received a substitute, truncated twice-weekly rail service via car-ferry across San Francisco Bay. Obviously, the Interstate Commerce Commission could not have denied a certificate authorizing abandonment *if it had not found*, as a subsidiary fact, that the substitute rail service was inadequate and that the former daily service, through the tunnel, was needed by the shipping public.

If appellant sincerely believes that the quality and quantity of rail service to be furnished once the tunnel is repaired should be reexamined, there will be ample opportunity for appellant to seek such reexamination. Once the tunnel is repaired, the quality and quantity of service to be provided to southern Marin County can be reexamined in light of actual operating conditions. It is premature to raise that issue now, quite aside from the fact that it raises no federal issue.

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4. PROCEEDINGS IN INTERSTATE COMMERCE COMMISSION FINANCE DOCKET NO. 23249 ARE NOT MATERIAL TO THIS APPEAL

While this Court was deliberating appellant's previous appeal from the order of the Interstate Commerce Commission in Finance Docket No. 21725, and shortly before the PUC issued its order, appellant filed a new applica-

tion seeking abandonment of the same line of railroad involved in Finance Docket No. 21725. Appellant now argues that no order to repair the tunnel should be permitted to go into effect until the Interstate Commerce Commision has acted in the new application. Thus, appellant has commenced an entirely new round of litigation designed, by the mere allegation of changed circumstances, to delay indefinitely the repair of the tunnel which has now blocked its main line for almost 4½ years.

Appellant, of course, has the right to be heard before the Interstate Commerce Commission if that Commission determines that the allegations of changed circumstances are anything but frivolous. However, such right to be heard cannot include the right to an indefinite continuation of the *de facto* abandonment. Under Section 1(20) of the Interstate Commerce Act, an abandonment without authorization from the Interstate Commerce Commission is not only unlawful, but subjects the officers of the carrier to criminal penalties. Recognizing, however, that natural catastrophes may result in the blocking of a railroad line, which the railroad wishes to abandon, and that it would be burdensome to require immediate repairs pending the conclusion of an abandonment proceeding, the Interstate Commerce Commission has not required immediate repair if prompt application for authorization to abandon is made. Likewise, the federal district courts have declined to issue orders requiring immediate repair under such circumstances. *Myers v. Arkansas & Ozarks Railway Corp.*, 185 F.Supp. 36 (W.D.Ark. 1960).

However, the extension of interim relief to a railroad, desirable as it may be during the pendency of an aban-

donment application before the Interstate Commerce Commission, cannot be permitted to extend over long periods of time by virtue of repeated applications for abandonment alleging changed conditions. Any such policy would result in complete destruction of the public protection accorded by Sections 1(18)-1(21) of the Interstate Commerce Act.

In the instant case, appellant was accorded every opportunity in the initial abandonment proceeding to prove its case. The tunnel remained blocked while appellant appealed to a three-judge district court and then to this Court. Appellant's privilege to litigate this matter on repeated occasions should not affect its responsibility to place the line back in service after final decision of this Court on the original abandonment application.

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5. THE PUBLIC UTILITIES COMMISSION HAD NO OBLIGATION TO STAY ITS HAND SIMPLY BECAUSE THE NWP HAD FILED A NEW APPLICATION TO ABANDON

Appellant's fifth point (Jurisdictional Statement, page 17) cites no federal statute, constitutional provision, or decision raising a federal question by virtue of the PUC's refusal to receive new evidence to support its order to repair the tunnel. The decision cited by appellant (which was the final decision of this Court on the Los Angeles Union Terminal situation), while making a reference to the evidence which was adduced before the California Railroad Commission in that case, does not support the proposition that a proper order of the PUC cannot be based upon findings made by the Interstate Commerce

Commission. The rule stated in that case, *Atchison T. & S.F.Ry. v. Railroad Commission,* 283 U.S. 380, 396 (1931), is that the test of state regulation of railroads is "whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one."

The regulation by the PUC in the instant case is reasonable. The Interstate Commerce Commission had ruled that the public convenience and necessity would not permit the abandonment of the railroad line. Such ruling was based, in part, upon the demonstrated need of local shippers and communities for daily rail service. The Interstate Commerce Commission, however, did not order the repair of the tunnel since it does not have authority to order the construction or repair of facilities. This explains why the California Commission, rather than the Interstate Commerce Commission acted as it did in this case and why it acted as it did in the Los Angeles *Union Terminal* matter. There was nothing unreasonable or arbitrary in the PUC's decision to rely upon the evidence of need which had been adduced before the Interstate Commerce Commission rather than reopening the same question in a new hearing.

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6. WHETHER THE FINDINGS OF THE INTERSTATE COMMERCE COMMISSION ARE RES JUDICATA IS IMMATERIAL

Appellant argues that the orders and findings of the Interstate Commerce Commission are not *res judicata.* Assuming that the findings of the Interstate Commerce Commission in Finance Docket No. 21725 were not *res judicata,* they could still be relied upon by the PUC as an

adequate basis for its order to repair the tunnel and restore the former rail service. Once the Interstate Commerce Commission had acted, and its order became final on appeal, the question of abandonment could not be relitigated or redetermined by the California Public Utilities Commission. There was no question remaining whether there could be an abandonment of the line. There was no question remaining whether public need required restoration of the line to operating condition. It would have been senseless to relitigate that issue, and furthermore, it would have been an abrogation of the Interstate Commerce Commission's exclusive jurisdiction to determine whether a railroad line may be abandoned. Whether the Interstate Commerce Commission's findings were *res judicata,* as that term is normally used, is therefore of no consequence.

CONCLUSION

Only two federal questions could possibly be raised by the PUC's order requiring appellant to repair the tunnel and restore former rail service.

The first such question would be whether such order imposed an undue burden upon Interstate Commerce. The Interstate Commerce Commission held that restoration of the line in question would not unduly burden interstate commerce, and that Commission's findings and decision have been upheld by this Court. The cost of repairing the tunnel was litigated at great length before the Interstate Commerce Commission, and was fully considered in arriving at its conclusion. Therefore, an order of the California Commission requiring appellant to do exactly what the Interstate Commerce Commission contemplated appellant must do, cannot be an undue burden upon interstate commerce.

The second federal question would be whether the PUC's order deprived appellant of its property without due process of law. Put another way, was this act of state regulation reasonable? There is no substantial question as to the reasonableness of the PUC's order. It was manifestly reasonable to require appellant to do that very thing which was contemplated by the Interstate Commerce Commission in denying authority to abandon the line. Procedurally, it was fair and reasonable to rely upon the findings as to public need for the former rail service made by the Interstate Commerce Commission. Moreover, it was necessary in order to avoid relitigating the question of public convenience and necessity which is

the exclusive domain of the Interstate Commerce Commission.

State regulation which is reasonable and which does not invade the preempted fields of federal jurisdiction, offends neither the due process clause of the Fourteenth Amendment nor the commerce clause.

We respectfully submit that the decisions of the Public Utilities Commission of the State of California and of the Supreme Court of the State of California are plainly correct, that appellant has presented no substantial question for the decision of this Court, and that the judgment of the Supreme Court of the State of California should be affirmed.

BORIS H. LAKUSTA

Attorney for Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California, County of Marin, California, Marin County Development Association, Camgros Gravel & Fuel Co., Inc., Chris Craft Sales of San Rafael, Colonial Wax Products Corporation of California, Golden Gate Distributing Co., Henry Hess Co., California Newspapers, Inc., McPhail Fuel Co., P.B.M. Inc., Rice Supply, Inc., A. G. Schoonmaker Co., Service Lumber Co., and Shamrock Materials, Inc., Appellees

GRAHAM JAMES & ROLPH
E. MYRON BULL, JR.
Of Counsel

Date: November 12, 1965

Certificate of Service

I, Boris H. Lakusta, attorney for the City of San Rafael, California, et al., appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of November, 1965, I served copies of the foregoing Motion to Affirm on the several parties hereto, as follows:

1. On the Northwestern Pacific Railroad Company, *appellant,* by mailing a copy, in a duly addressed envelope with air mail postage prepaid, to Randolph Karr, Esq., its attorney, Pacific Electric Building, 610 South Main Street, Los Angeles, California 90014.

2. On the Public Utilities Commission of the State of California, *appellee,* by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Mary Moran Pajalich, and Hector Anninos, its attorneys, 5072 State Building, San Francisco, California 94102.

Boris H. Lakusta

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